

**United States Bankruptcy Court
Western District of Wisconsin**

Cite as: [Unpublished]

Mary E. Toth, Plaintiff v. Fort Atkinson Memorial Hospital, Defendant

(In re Mary E. Toth, Debtor)

Bankruptcy Case No. 96-33726-7, Adv. Case No. 96-3227-7

United States Bankruptcy Court
W.D. Wisconsin, Madison Division

June 9, 1997

Michael J. Rynes, Bankruptcy Law Services, Madison, WI, for the debtor-plaintiff.

Peter B. King, Fontana, WI, for the defendant.

Robert D. Martin, United States Bankruptcy Judge

MEMORANDUM DECISION

Pursuant to its state court judgment against the debtor, Fort Atkinson Memorial Hospital garnished the debtor's wages. The continuing garnishment caught \$745 within 90 days of bankruptcy. After receiving notice of the bankruptcy, Fort Atkinson refunded \$145.87. The trustee did not try to recover the remaining \$599.13, so Ms. Toth brought this preference action under §522(h).¹ Fort Atkinson now defends its right to keep the rest of the garnished wages, arguing that it is excepted from avoidance and recovery by 11 U.S.C. §547(c)(8).

11 U.S.C. §547(c)(8) provides:

(c) the trustee may not avoid under this section a transfer —

¹11 U.S.C. §522(h) provides:

The debtor may avoid a transfer of property of the debtor . . . to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if —

(1) such transfer is avoidable by the trustee under section . . . 547 . . . ; and
(2) the trustee does not attempt to avoid such transfer.

(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than \$600.

The parties agree that Ms. Toth is an individual debtor with primarily consumer debts. However, the parties dispute whether the “aggregate value of all property that constitutes . . . such transfer” under the garnishment is less than \$600.

Fort Atkinson garnished on a weekly basis from July 12, 1996 until the debtor filed bankruptcy in September. Each weekly garnishment yielded less than \$600, however, the total Fort Atkinson garnished was \$745. The question then is whether each of Fort Atkinson’s weekly garnishments constitute a separate “transfer” under §547(c)(8). The answer is no.

In In re Alarcon, 186 B.R. 135 (Bankr. D.N.M. 1995), the court found the creditor unprotected by §547(c)(8) “if the aggregate amount of the payments exceeds \$600 but [a] single payment [does not] exceed \$600,” id. at 136, reasoning that the term “aggregate” is commonly understood to mean “a combined whole.” Other Code sections use “aggregate” as well to mean the sum or total — as in §522(d)(3), where the debtor’s interest is “not to exceed \$400 in value in any particular item or \$8000 in aggregate value” or in §522(d)(4), where “the debtor’s aggregate interest [is] not to exceed \$1000 in value” 11 U.S.C. §522(d)(3), (4). Less convincingly, the court noted that the rule for construing the Code, 11 U.S.C. §102(7), is that the singular includes the plural. Thus, the court held “transfer” should be read as “transfers” in §547(c)(8). Cf. In re Clark, 171 B.R. 563 (Bankr. W.D. Ky. 1994).

In In re Bunner, 145 B.R. 266 (Bankr. C.D. Ill. 1992), the creditor caught wages twice under a single garnishment order — first \$519 and then \$514. Fewer than 90 days later the debtors filed

bankruptcy. The court held that even though each individual withholding was less than the \$600 minimum, “[t]he plain language of §547(c)(8) mandates that both transfers be added together in determining whether the minimum of \$600 has been met [T]he reference in the statute to ‘the aggregate value of all property’ supports this conclusion.” Id. at 267. Because the total amount garnished was \$1033, the debtors could recover their wages.

The Seventh Circuit has yet to address the “plain meaning” of §547(c)(8). However, the Fifth Circuit recently sided with Alarcon and Bunner in finding that:

the plain meaning of §547(c)(8) and the legislative history of that provision allow multiple transfers to a single creditor to be made during the preference period to be aggregated when determining whether the \$600 threshold has been met.

In the Matter of Hailes, 77 F.3d 873, 874 (5th Cir. 1996).

A more restrictive view was expressed in In re Howes, 165 B.R. 270 (Bankr. E.D. Mo. 1994). The creditor garnished the debtor’s wages three times pursuant to two consecutive garnishment orders. The first order yielded two payments in the preference period totaling \$549.68, and the second yielded only one payment of \$376.13. First, the court looked to Missouri garnishment law to define a §547(c)(8) “transfer.” It found a creditor’s interest in wages is secure only when the creditor has a perfected judgment lien on the debt. This judgment lien is obtained “when a writ of garnishment in aid of execution is served.” Id. at 271. Thus, a “transfer” for purposes of §547(c)(8) is the service of the writ of garnishment. Because the creditor had served two garnishment orders, there were two “transfers.” Both were excepted from the trustee’s §547(b) recovery power because neither transfer exceeded the “\$600 limit.”

Under Wisconsin garnishment law, as in Missouri, the service of a garnishment order effects a

§547 “transfer.” In the Matter of Woodman, 8 B.R. 686, 687 (Bankr. W.D. Wis. 1981). In the present case, Fort Atkinson served Ms. Toth’s employer only once, and there is only one §547(c)(8) “transfer.” The amounts garnished pursuant to that transfer total more than \$600 and do not fall within the §547(c)(8) exception.

Nonetheless, Fort Atkinson argues §547(c)(8) applies because Fort Atkinson refunded that portion over the \$600 limit. However, “the [§547(c)(8)] exception does not give a creditor the right to keep the first \$600 of any preference Instead, it is an all or nothing exception.” Ginsberg & Martin, Ginsberg & Martin on Bankruptcy, §8.03[I] at 8-51 (4th ed. 1997). “If the debtor pays a creditor \$599, the creditor can keep the entire amount. If the debtor pays the creditor \$600, the entire amount must be returned” Id. In short, a refund after the fact does not reduce the total amount garnished to less than \$600. See In re Vickery, 63 B.R. 222 (Bankr. E.D. Tenn. 1986).

Because the transfer in this case does not fall within the exception claimed, it may be avoided and recovered by the debtor. Judgment may be entered accordingly.